

Supreme Court, U. S.

FILED

MAR 14 1978

MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT
OF THE
UNITED STATES

TERM, 1977

No. 77-570

BERNECIA E. AVERY, Petitioner

v.

NEW ENGLAND TELEPHONE AND TELEGRAPH
COMPANY, Respondent

BRIEF OPPOSING PETITION FOR A
WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE UNITED STATES

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To the Honorable, the Chief Justice and
Associate Justices of the Supreme Court
of the United States:

New England Telephone and Telegraph
Company, the Respondent herein, opposes
the Petition for Writ of Certiorari filed
by petitioner Bernecia E. Avery, as
follows.

ARGUMENT

Respondent filed in the United States
District Court for the District of Vermont
a Motion to Dismiss the Complaint under
Rule 12(b)(1) and 12(b)(6) for lack of
jurisdiction over the subject matter and
for failure of the plaintiff's complaint
to state a claim upon which relief can
be granted. In its December 23, 1976
Memorandum and Order that Court granted
said Motion and held in part as follows:

"Given the liberal interpretation to which it is entitled on a motion to dismiss, Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), the plaintiff's complaint appears to assert a deprivation of her 14th Amendment rights to due process, in violation of 42 U.S.C. §1983, and a pendent claim that her rights under Vermont law have been violated. The plaintiff, however, has failed to allege the requisite state involvement for a valid claim under §1983. The mere fact that the defendant is a state-regulated corporation is insufficient to establish the existence of this essential ingredient in the absence of an allegation that the State of Vermont, acting through its agents or officials, in some way placed its "imprimatur" on the defendant's practices. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974)."

In Jackson, the Supreme Court faced a claim by a customer of an electric utility company that her Fourteenth Amendment rights to due process were violated when her electric service was terminated without a prior hearing. The Court held:

"Here the action complained of was taken by a utility company which is privately owned and operated, but which in many particulars of its business is subject to extensive state regulation. The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for the purposes of the Fourteenth Amendment. Nor does the fact that the regulation is

extensive and detailed, as in the case of most public utilities, do so." 419 U.S. at 350. (Citations omitted.)

The Supreme Court went on to reject arguments that the utility's acts were state action on theories that (1) the State had granted it a monopoly, 419 U.S. at 351-52, (2) the utility provided an essential public service and thereby performed a "public function," 419 U.S. at 352-54, (3) the State of Pennsylvania had "specifically authorized" the termination practice, 419 U.S. at 354-57, and (4) there was a symbiotic relationship between the State and the utility. 419 U.S. at 357-58.

The Supreme Court also made it clear that its decision applied to regulated telephone companies. In footnote 7, the Court held:

"Enterprises subject to the same regulatory system as Metropolitan are enumerated in the definition of "public utility" contained in Pa Stat Ann, Tit 66, §1102(7) (1959 and Supp 1974-1975). Included in this definition are all companies engaged in providing gas, power, or water; all common carriers, pipeline companies, telephone and telegraph companies, sewage collection and disposal companies, and corporations affiliated with any company engaging in such activities...The incidents of regulation do not appear materially different between enterprises...." 419 U.S. at 350, n. 7.

Similarly, the First Circuit Court of Appeals held in Davis v. Richmond, 512 F.2d 201, 203 (1st Cir. 1975):

"The fact that defendants' conduct [taking possession of a tenant's belongings pursuant to the Massachusetts lien statute] was permitted and regulated by state law--as much private conduct is--does

not by itself make the conduct's connection with the state sufficiently close so that the private conduct 'may be fairly treated as that of the State itself'."

See also Fletcher v. Rhode Island Hospital Trust National Bank, 496 F.2d 927, 932 (1st Cir. 1974), cert. denied, 419 U.S. 1001 (1974), which held that "the mere fact that banks are closely related by the state...and federal government does not render all they do state action."

It is conceivable that Plaintiff's Complaint also alleges that the Defendant has violated her rights under the Fifth Amendment of the Constitution of the United States. The criteria utilized to find federal action sufficient to invoke the Fifth Amendment are the same criteria used to determine the existence of state action under the Fourteenth. Geneva Towers Tenants Organization v. Federated Mortgage Investors, 504 F.2d 483, 487 (9th Cir. 1974); Greenya v. George Washington University, 512 F.2d 556, 559-62 (D.C. Cir. 1975), cert. denied, ---U.S.---, 46 L. Ed. 2d 369 (1975) (instructor employed by private university to teach federal government employees at government facilities held not to be government employee for purposes of Fifth Amendment).

In determining whether the acts of a regulated utility constitute federal government action under the Fifth Amendment, the holdings of Jackson (supra) apply. Brown v. D. C. Transit System, Inc., 523 F.2d 725, 726-29 (D.C. Cir. 1975), cert. denied, ---U.S.---, 46 L. Ed. 2d 91, 96 Sup. Ct. 121 (1975) (applying Jackson to find no federal action under Fifth Amendment by private regulated transit company); Northrip v. Federal National Mortgage Association, 527 F.2d 23, 30-33 (6th Cir.

1975) (applying Jackson to find no federal action under Fifth Amendment).

CONCLUSION

Wherefore, respondent respectfully prays that the petition for writ of certiorari be denied.

NEW ENGLAND TELEPHONE AND
TELEGRAPH COMPANY,
Respondent

by

Richard H. Wadhams, Jr., Esq.
Counsel

Dated: March 10, 1978.

**AFFIDAVIT OF SERVICE
AND APPEARANCE**

The undersigned hereby enters his appearance in the above captioned matter and affirms that he served the petitioner company by mailing three copies of the foregoing to counsel for petitioners, Norman J. Bernstein, Esq., Londonderry, Vermont 05148, postage prepaid on the _____ of March, 1978.

Richard H. Wadhams, Jr.
Pierson, Affolter & Wadhams
253 South Union Street
Burlington, Vermont 05401

Sworn to and subscribed to before me
this _____ day of March, 1978.

_____, Notary Public